On March 23, 2020, in response to the COVID-19 pandemic, Michigan Governor Gretchen Whitmer issued Executive Order No. 2020-21 (E.O. 2020-21), a “stay home, stay safe” directive setting forth the state’s “[t]emporary requirement to suspend activities that are not necessary to sustain or protect life.” A sweeping order that appears to be broader than orders that have been issued by other states, E.O. 2020-21 directs “all individuals currently living within the State of Michigan” ... “to remain at home or in their place of residence to the maximum extent feasible” ... “except to the extent that those workers are necessary to sustain or protect life or to conduct minimum basic operations.” It is effective at 12:01 a.m. March 24, 2020, and continues until April 13, 2020, at 11:59 p.m.
Highlights

It appears that the core issues and topics raised by the current version of E.O. 2020-21, and described more fully below, are the following:

1. The restrictions take effect at 12:01 a.m. March 24, 2020, and expire at 11:59 p.m. on April 13, 2020.
2. The order is to be “construed broadly to prohibit in-person work.”
3. Employers are prohibited from requiring workers to leave their homes or places of residence unless the worker qualifies for an exemption.
4. The order defines worker exemptions, not industry or sector exemptions.
5. In-person work is allowed for workers necessary to either sustain/protect life or to conduct minimum basic operations.
6. The order mostly leaves employers with the difficult task of designating which workers qualify for in-person work.
7. Employers are to advise workers if they meet the criteria for in-person work. Oral notice is allowed until March 31, 2020.
8. The order limits individual travel rights.
9. A violation of the order is a misdemeanor.

E.O. 2020-21 requires that “no person or entity shall operate a business or conduct operations that require workers to leave their homes or places of residence except to the extent that those workers that are necessary to sustain or protect life [also known as ‘critical infrastructure workers’] or to conduct minimum basic operations.”

Importantly, until further guidance is issued, it appears from the text of E.O. 2020-21 that not every worker in a critical infrastructure business will automatically qualify as a “critical infrastructure worker.” The business or operation would need to determine which workers are necessary to critical infrastructure activities and make designations. It appears that these designations can be categorical based upon jobs, groups, or departments.

Critical Infrastructure Workers

“Critical infrastructure workers” are those workers described by the director of the U.S. Cybersecurity and Infrastructure Security Agency in his guidance of March 19, 2020, on the COVID-19 response. It appears from E.O. 2020-21 that even critical infrastructure businesses or operations in each of the following sectors must designate which workers may continue in-person operations:

- Healthcare and public health
- Law enforcement, public safety, and first responders
• Food and agriculture
• Energy
• Water and wastewater
• Transportation and logistics
• Public works
• Communications and information technology, including news media
• Other community-based government operations and essential functions
• Critical manufacturing
• Hazardous materials
• Financial services
• Chemical supply chains and safety
• Defense industrial base

• Child care (includes “child care workers at disaster relief childcare centers [], but only to the extent necessary to serve the children or dependents of critical infrastructure workers as defined in this order”)

• Insurance industry (specifically, only workers whose “work cannot be done by telephone or remotely”)

• Businesses or operations whose workers and volunteers “provide food, shelter, and other necessities of life for economically disadvantaged or otherwise needy individuals, individuals who need assistance as a result of this emergency, and people with disabilities”

• Labor unions (specifically, “workers who perform critical labor union functions”)

• Designated suppliers and distribution centers

**Designated Suppliers and Distribution Centers**

A business or operation that employs critical infrastructure workers may designate suppliers, distribution centers, or service providers whose continued operation is necessary to enable, support, or facilitate the work of its critical infrastructure workers.

A designated supplier, distribution center, or service provider “may in turn designate workers as critical infrastructure workers,” but only to the extent those workers are “necessary to enable, support, or facilitate the work of the original operation’s or business’s critical infrastructure workers.”

“Designated suppliers, distribution centers, and service providers may in turn
designate additional suppliers, distribution centers, and service providers whose continued operation is necessary to enable, support, or facilitate the work of their critical infrastructure workers.”

Such designated additional suppliers, distribution centers, and service providers “may designate workers as critical infrastructure workers but only to the extent that those workers are necessary to enable, support, or facilitate the work of the critical infrastructure workers at the supplier, distribution center, or service provider that has designated them.”

“Businesses, operations, suppliers, distribution centers, and service providers must make all designations in writing to the entities they are designating, whether by electronic message, public website, or other appropriate means. Such designations may be made orally until March 31, 2020 at 11:59 pm.”

**Workers Necessary to Maintain Basic Operations**

“Workers necessary to maintain basic operations” is left nearly undefined by E.O. 2020-21. The order simply states that they are “workers whose in-person presence is strictly necessary to allow the business or operation to maintain the value of inventory and equipment, care for animals, ensure security, process transactions (including payroll and employee benefits), or facilitate the ability of other workers to work remotely.” Further guidance in this area from The State of Michigan would be helpful.

**Employer Designations for In-Person Work**

Workers who meet one of two exemptions are permitted to continue in-person work. It appears from E.O. 2020-21 that employers are tasked with determining which of their workers are (1) critical infrastructure workers or (2) necessary to conduct minimum basic operations. The business or operation must then inform such workers of that designation. Designations may be made orally until March 31, 2020 at 11:59 pm. After that time, designations must be made in writing, “whether by electronic message, public website, or other appropriate means.”

Businesses and operations need not designate:

1. workers in health care and public health;
2. workers who perform necessary government activities; or
3. workers and volunteers providing food, shelter, and other necessities of life for economically disadvantaged (see above).

**Government Activities**

The order suspends “[a]ll in-person government activities at whatever level (state, county, or local) that are not necessary to sustain or protect life, or to supporting those businesses and operations that are necessary to sustain or protect life.”

“[N]ecessary government activities include activities performed by critical
infrastructure workers, including workers in law enforcement, public safety, and first responders.” Such activities also include, but are not limited to:

1. public transit, trash pick-up and disposal;
2. management and oversight of elections;
3. operations necessary to enable transactions that support the work of a business’s or operation’s critical infrastructure workers; and
4. the maintenance of safe and sanitary public parks so as to allow for outdoor recreation.

**Travel Restrictions**

The order permits individuals to “leave their homes or place[s] of residence, and travel as necessary” to:

- engage in outdoor activity, including walking, hiking, running, cycling, or any other recreational activity;
- perform their jobs as critical infrastructure or minimum basic operations work after being so designated by their employers;
- perform necessary government activities;
- perform tasks that are necessary to their health and safety, or to the health and safety of their family or household members (including pets);
- purchase groceries, take-out food, gasoline, needed medical supplies, and any other products necessary to maintain the safety, sanitation, and basic operation of their residences;
- care for family member, minors, dependents, the elderly, persons with disabilities or other vulnerable persons;
- visit an individual under the care of a health care facility, residential care facility, or congregate care facility;
- attend legal proceedings or hearings for essential or emergency purposes as ordered by a court;
- work or volunteer for businesses or operations (including both and religious and secular nonprofit organizations) that provide food, shelter, and other necessities of life for economically disadvantaged or otherwise needy individuals, individuals who need assistance as a result of this emergency, and people with disabilities;
- return to a home or place of residence from outside [Michigan];
- leave [Michigan] for a home or residence elsewhere;
• travel between two residences in [Michigan]; or
• travel as required by law enforcement or a court order, including the transportation of children pursuant to a custody agreement.

Proactive Measures All Operating Businesses Must Take

Under the order, “[b]usinesses and operations maintaining in-person activities must adopt social distancing practices and other mitigation measures to protect workers and patrons. Those practices and measures include, but are not limited to:

1. Restricting the number of workers present on premises to no more than is strictly necessary to perform the business’s or operation’s critical infrastructure functions.

2. Promoting remote work to the fullest extent possible.

3. Keeping workers and patrons who are on premises at least six feet from one another to the maximum extent possible, including for customers who are standing in line.

4. Increasing standards of facility cleaning and disinfection to limit worker and patron exposure to COVID-19, as well as adopting protocols to clean and disinfect in the event of a positive COVID-19 case in the workplace.

5. Adopting policies to prevent workers from entering the premises if they display respiratory symptoms or have had contact with a person who is known or suspected to have COVID-19.

6. Any other social distancing practices and mitigation measures recommended by the Centers for Disease Control.”

Given the extraordinary breadth of Governor Whitmer’s E.O. 2020-21, many businesses will be able to continue to operate, but by the terms of the order they will need to designate workers, suppliers, and distribution centers.


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